

California Supreme Court Confirms Call-Recording Statute Applies to Parties and Nonparties Alike

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California Penal Code Section 632.7, part of California's Invasion of Privacy Act, prohibits the recording of a communication between a cellular or cordless telephone and another telephone without the consent of all parties.

Previously, a California Court of Appeal interpreted the statute as only applying to third-party eavesdroppers and not the actual parties to the call. However, in *Smith v. LoanMe*, the California Supreme Court reversed that decision and held that Section 632.7 applies to both parties and nonparties. This decision confirms that all businesses that record calls with California customers could be vulnerable to claims under the statute unless they obtain the consent of the called customer.

Case Summary

In 2015, Plaintiff Jeremiah Smith answered a call on his cordless telephone from defendant LoanMe, Inc., which was trying to reach Smith's wife about her loan account. Three seconds into the call, LoanMe caused a "beep" tone to sound, but did not orally inform Smith that the call was being recorded. Smith advised LoanMe that his wife was not available, and the call ended just 18 second after it began.

The plaintiff, after discovering that LoanMe had recorded the call, filed a putative class action consisting of "[a]ll persons in California whose inbound and outbound telephone conversations involving their cellular or cordless telephones were recorded without their consent by [LoanMe] or its agent/s within the one year prior to the filing of this action." The complaint alleged that the recording of these calls violated Section 632.7.

Procedural History

At trial, the court held that the beep tone gave Smith adequate notice that the call was being recorded, and it entered judgment in favor of LoanMe. Smith appealed.

The California Court of Appeal did not examine the consent issue decided by the Superior Court, but instead examined whether Section 632.7 forbids only the intentional recording of conversations by person other than the parties to the conversation. The Court of Appeal concluded that Section 632.7 does not apply to parties to a conversation and only prohibits third-party eavesdroppers from intentionally recording telephonic communications without the parties' consent.

The California Supreme Court granted review to determine whether Section 632.7 prohibits *parties to a*

communication from recording calls without consent or only applies to *nonparties* (such as eavesdroppers).

Decision

The California Supreme Court reversed the Court of Appeal's decision and held that Section 632.7 applies to parties and nonparties alike.

The Court began its analysis by examining the plain language of the statute. The Court concluded that, when read in context, the most plausible interpretation of Section 632.7 prohibited both parties and nonparties from intentionally recording a covered communication without the consent of all parties. Specifically, the Court focused its analysis on the following statutory language: "[e]very person who, without the consent of all parties to a communication, intercepts or receives and intentionally records ... a communication," and concluded that the consent language in the statute applies to the recording component, and not to the manner in which the recording party received the call.

The Court next turned to the legislative history and intent of the statute, as well as its goals, and concluded that both favored an interpretation of Section 632.7 that applied to both parties and nonparties alike. It determined that a clear goal of the legislature in adding Section 632.7 to the California Privacy Act was to close the gap between protections afforded to landline telephone conversations and those conducted with cellular or cordless phones; if Section 632.7 were interpreted to only apply to nonparties' recording of telephone conversations, it would leave a substantial gap in those protections, which could not have been what the legislature intended. Moreover, expanding the purview of the statute to prohibit both parties and nonparties from recording calls without consent furthers the intended purpose of the statute — protecting the privacy of California residents.

The court then remanded the case to the Court of Appeal to determine whether LoanMe's beep tone at the start of the call gave the plaintiff sufficient notice that the call would be recorded.

Key Takeaways

This decision will likely lead to an expansion of putative class actions based on Section 632.7. The recording of customer calls is nearly ubiquitous in consumer-facing businesses given the importance of maintaining such records for business purposes and employee training. Businesses that record calls with California customers should examine their processes for obtaining consent to record those calls.

Further, while putative class actions brought under Section 623.7 are likely to increase, defendants still have potential defenses to Section 632.7 class claims. Specifically, plaintiffs face difficulty in demonstrating commonality, predominance, and typicality given that whether a customer had adequate notice the call was being recorded will depend on the circumstances in which the individual call was made.

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